A

JENTERA CERIA SDN BHD

v.

AIR-MARINE CARGO AGENCY SDN BHD

B

HIGH COURT SABAH & SARAWAK, BINTULU
ZULKIFLI BAKAR JC
[CIVIL APPEAL NO: 12-06-2004 (BTU)]
26 JULY 2006

C ***CIVIL PROCEDURE:*** *Striking out - Appeal - Whether action an abuse of court process - Whether there was decision in early action capable of determining liability of appellant/defendant - Whether respondent/ plaintiff legally entitled to commence fresh action and prove cause at trial - Whether there was concrete evidence that action was wholly and plainly* D *'pretenceless' or 'groundless' - Whether case a fit and proper case to be struck out*

The appellant/defendant herein filed a notice of application dated 2 April 2004 before the sessions court for an order that the E respondent/plaintiff's action herein be struck out with costs on the grounds that the same was an abuse of the process of the court. The respondent/plaintiff's action was filed on 20 October 2003 against the appellant/defendant for recovery of debt in the sum of RM169,886.54. On 23 September 2004, the Sessions Court Judge F dismissed the application. Being dissatisfied with the said decision, the appellant/defendant appealed against the whole of the said decision. The chronology of events were that the respondent/ plaintiff had provided work and services to the appellant/defendant for its project or contract works at Bintulu and claimed that the G appellant/defendant owed them the said sum being the principal sum for the said works and services. The appellant/defendant denied that it was indebted to the respondent/plaintiff. The respondent/plaintiff had, on 30 July 2001, commenced an action against the appellant/defendant *vide* Summons No. 52-367-2001- H II in the sessions court at Kuching in respect of the same invoices and amounts that the respondent/plaintiff had claimed from the appellant/defendant as in this action. The respondent/plaintiff did obtain judgment in default against the appellant/defendant for the said claims on 30 August 2001. On 20 September 2001, the I respondent/plaintiff did obtain a garnishee order against one A & H Project Services Sdn Bhd (then owing monies to the respondent/plaintiff) ordering the said A& H Project Services Sdn Bhd to pay to the respondent/plaintiff the sum above. The A &

H Project Services Sdn Bhd did pay the judgment sum in full in the garnishee order to the respondent/plaintiff. On 13 July 2002, the judgment in default against the appellant/defendant was set aside by the sessions court in the said Summons 52-367-2000-II. On 23 April 2003, the respondent/plaintiff's appeal *vide* Civil Appeal No. 12-43-2002-I against the decision of the sessions court was dismissed by the High Court in Kuching. Therefore, the appellant/defendant claimed that since the respondent/plaintiff was paid by A & H Project Services Sdn Bhd on behalf of the appellant/defendant pursuant to the said garnishee order, this action and statement of claim was an abuse of the process of the court. On 20 October 2003, the respondent/plaintiff filed a fresh action against the appellant/defendant in the sessions court under Summons No: S2-153-2003 (BTU) over the debts together with interest and costs. This fresh action was on the same subject matter as in the early action in Summons No. 52-367-2001-II. On 3 March 2004, the appellant/defendant entered the defence to the respondent/plaintiff's fresh action. As for the instant action (Summons No: 52-153-2003 (BTU), the appellant/defendant filed an application for striking out, which was dismissed by the Sessions Court Judge. Hence, the instant appeal.

Held (dismissing the appeal):

(1) There was no dispute from the appellant/defendant that the case had not been decided or the issues in the early action had not been adjudicated upon. The appellant/defendant had not entered into defence to the early action under Summons No. 52-367-2001-II. The pleading in the early action was different from the present action. In the present action, the appellant/defendant did not plead or adduce any evidence that the early action had been decided on the merits. In other words, in the early action there was no decision on the appellant/defendant's liability as the appellant/defendant had successfully set aside the foundation of the action itself which would otherwise be relied upon as an estoppel. As a result, there was no decision in the early action capable of determining the liability of the appellant/defendant or the amount recoverable or render the default judgment effective or capable of judicial recognitions or execution. (para 11)

(2) The appellant/defendant had obtained court orders not just to set aside the default judgment but also the garnishee order and the whole action in which the appellant/defendant could not approbate or reprobate and turn around to argue that the original debts had been settled or there was an abuse of the process of the court when the fresh action was instituted. If not because of the setting aside orders, there was no necessity for the respondent/plaintiff to file this fresh action. (para 11)

(3) There was no justification for the appellant/defendant to argue that the original debts in the early action had been executed when the appellant/defendant had at the same time also obtained the court orders to demolish the very foundation of the earlier proceedings. In the eye of the law, the liability in the early action between the appellant/defendant and respondent/plaintiff had not been determined. Therefore it followed that the respondent/plaintiff was legally entitled to commence the fresh action and to prove the cause at the trial. It was erroneous to say that the respondent/plaintiff by instituting this fresh action would get the payment of the same debts twice or subsequent judgment tantamount to double recoveries of the same debts. (para 11)

(4) The appellant/defendant should have produced concrete evidence to show that the instant action was wholly and plainly 'pretenceless' or 'absolutely groundless'. However, the appellant/defendant did not or could not adduce any evidence to such conclusion. A mere assertion was insufficient to deprive the respondent/plaintiff from the judgment seat. It would be very unjust and prejudicial for the appellant/defendant to obtain the court orders for setting aside all the proceedings in the early action and now in the instant application to contend that the respondent/plaintiff had successfully executed a judgment that had been later set aside in order to get another court order for the striking out of the instant action against the respondent/plaintiff. But the appellant/defendant could not show any evidence that the instant action was an abuse of the process in the sense that it was frivolous, vexatious or manifestly groundless or in which there was no cause of action in law. The instant case was not a fit and proper case to be struck out. (paras 12 & 13)

[Order accordingly.]

Case(s) referred to:
Jamir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 14 r. 21

Other source(s) referred to:
Sir Jack Jacob & Iain S Goldrein, *Pleadings: Principles and Practice 1990,* London Sweet & Maxwell, 1990, pp 226-227

For the appellant/defendant - Stephanie Chin; M/s Alvin Chong & Partners
For the respondent/plaintiff - Henry Ling; M/s Ling & Wong

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkifli Bakar JC:

[1] The appellant/defendant herein filed a notice of application dated 2 April 2004 before Sessions Court at Bintulu, Sarawak for an order that the respondent/plaintiff's action herein be struck out with costs on the grounds that the same is an abuse of process of the court. The application was brought under O. 14 r. 21 Subordinate Courts Rules 1980. The respondent/plaintiff's action was filed on 20 October 2003 against the appellant/defendant for recovery of debt in the sum of RM169,886.54 (being the principal sum of RM104,344.80 and interest thereon of RM65,541.65) as at 6 October 2003 together with interest at the rate of 2% per month on principal sum from 7 October 2003 till date of judgment and thereafter at the rate of 8% per annum until the judgment is satisfied, costs to be taxed unless agreed and further or other relief.

[2] On 23 September 2004, the Sessions Court Judge dismissed the application with costs. Being dissatisfied with the said decision the appellant/defendant appeal against the whole of the said decision.

[3] The facts upon which the application is brought are set out in the affidavits filed:

i) Affidavit in support by appellant/defendant deposed by Augustine Law Sek Hian on 31 March 2004;

ii) Affidavit in opposition by respondent/plaintiff affirmed by Ang Say Yew on 26 April 2004;

iii) Affidavit in reply by appellant/defendant affirmed by Augustine Law Sek Hian on 20 May 2004;

iv) Affidavit in Opposition No. 2 by respondent/plaintiff affirmed by Ang Say Yew on 26 May 2004;

v) Affidavit in reply (2) by appellant/defendant affirmed by Augustine Law Sek Hian on 8 June 2004.

which could be summarised as follows:

1. The respondent/plaintiff has between November 2000 and March 2001 at the request of Kalieng Company Sdn. Bhd. *via* its agent or servant (from or about 27 November 2001 Kalieng Company Sdn. Bhd. has change its trade name to Jentera Ceria Sdn. Bhd. – the appellant/defendant herein) provided work and services to the appellant/defendant for its project or contract works at Bintulu, which the respondent/plaintiff agreed and has done such work and supplied such services to the appellant/defendant. The respondent/plaintiff claimed that the appellant/defendant has at 6 October 2003 owed and indebted to them an aggregated sum of RM169,886.54 being the principal sums (under the invoices in RM104,344.89 and interest thereon in RM65,541.65) for the said works and services.

2. The appellant/defendant on the other hand claimed that the 'works and services' allegedly provided by respondent/plaintiff to the appellant/defendant were in fact provided to Kalieng Holdings Sdn. Bhd. a separate legal entity from the appellant/defendant. The appellant/defendant denies that it is indebted to respondent/plaintiff in the sum RM169,886.54 or indeed any sum at all.

3. On or about 30 July 2001, the respondent/plaintiff did commence an action against the appellant/defendant *vide* Summons No. 52-367-2001-II in the Sessions Court at Kuching in respect of the same invoices and amounts that the respondent/plaintiff has claimed from the appellant/defendant as in this action. The respondent/plaintiff did obtain judgment in default against the appellant/defendant for the said claims on or about 30 August 2001.

4. On or about 20 September 2001, the respondent/plaintiff did obtain a Garnishee Order against one A & H Project Services Sdn. Bhd. (then owing monies to the respondent/plaintiff) ordering the said A & H Project Services Sdn. Bhd. to pay to the respondent/plaintiff the sum in para 1 above. The A & H Project Services Sdn. Bhd. did pay the judgment sum in full in the Garnishee Order to the respondent/plaintiff.

5. On or about 13 July 2002, the judgment in default against the appellant/defendant was set aside by the Sessions Court at Kuching in the said Summons No. 52-367-2000-II.

6. On or about 23 April 2003, the respondent/plaintiff's appeal *vide* Civil Appeal No. 12-43-2002-I against the decision of the Sessions Court was dismissed by the High Court at Kuching.

7. Therefore the appellant/defendant says that since the respondent/plaintiff was paid by A & H project Services Sdn. Bhd. on behalf of the appellant/defendant pursuant to the Garnishee Order made in Summons No. 52-367-2001-II this action and statement of claim is an abuse of process of the court.

8. The respondent/plaintiff says that the action in Sessions Court at Kuching in Summons No. 52-367-2001-II had been dismissed for the non-compliance of relevant provisions of the Subordinate Courts Rules 1980 and the said judgment had been reversed, the respondent/plaintiff would have to pay into court the sums if received pending the disposal of the action herein and further there was no final judgment in Summons No. 52-367-2001-II since there was never any issue litigated or tried yet.

[4] The learned counsel for the appellant/defendant contends that what was raised by these facts is a question of law, namely:

> Whether a plaintiff who has successfully executed a judgment that has been later set aside can retain the money paid under a garnishee order and file another action on the same debt.

[5] It is my opinion, to answer the question posed by learned counsel for the appellant/defendant could also be done by considering the application of appellant/defendant to strike out the respondent/plaintiff's action on the ground of abuse of process of the court which is the subject matter of this appeal.

[6] Abuse of the process of the court is said to be a 'reason' which the court may exercise discretion to strike out a case and this 'reason' is needed to be understood.

[7] Sir Jack Jacob & Iain S. Goldrein *"'Pleadings: Principles and Practice"*, 1990 London Sweet & Maxwell, 1990 at pp 226-227 explains the meaning of the abuse of the process of the court as follows:

> The term 'abuse of process' is often used interchangeably with the terms 'frivolous' or 'vexatious' either separately or more usually in conjunction. An action is an abuse of the process of the Court where it is 'pretenceless' or 'absolutely groundless' and the Court has the power to stop it summarily and prevent the time of the public and the Court from being wasted.

The learned authors, on the circumstances the court may strike out an action, writes:

> The term 'abuse of the process of the court' is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the court will intervene to stay or even dismissal of proceedings, although it should not be lightly done, yet it may often be required by the very essence of justice to be done.

Since the term 'abuse of the process of the court' is also used interchangeable with the term 'frivolous' or 'vexatious', it is worth to know the meaning of 'frivolous' and 'vexatious'. The same authors *supra,* at pp 222-223 explains the meaning of 'frivolous' and 'vexatious' and 'the approach of the court' writes as follows:

> **Frivolous – meaning.** A Pleading or an action is frivolous when it is without substance or unarguable.
>
> Thus, a proceeding may be said to be frivolous when:
>
> (a) a party is trifling with the Court; or
>
> (b) when to put it forward would be wasting the time of the Court; or
>
> (c) when it is not capable of reasoned argument, or
>
> (d) it is without foundation; or

(e) where it cannot possibly succeed; or

(f) where the action is brought or the defence is raised only for annoyance; or

(g) to gain some fanciful advantage; or

(h) when it can really lead to no possible good.

Vexatious – meaning. A Pleading or an action is vexatious when it lacks *bona fides* and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. So, it is vexatious and wrong to make solicitors parties to an action merely in order to obtain discovery from them.

The approach of the Court. This jurisdiction to strike out a pleading or dismiss an action should not be exercised merely because the facts disclosed some improbable or it is difficult to believe that they could be proved. It should exercised judicially in plain and obvious cases. As Lindley, LJ said:

> It appears to me that the object of the rule is to stop cases which ought not to be launched – cases which are obviously frivolous or vexatious, or obviously unsustainable.

For this purpose, the court is entitled to go behind the pleadings, and to inquire summarily what are the true facts and circumstances of the case. It may admit affidavit evidence.

[8] The affidavits filed has been set out earlier in this judgment and needed to be carefully examined. Upon examining the affidavits of the appellant/defendant. I found that the appellant/defendant did not state or disclose any facts as to whether the real questions or issues for the previous actions in Summons No. 52-367-2001-II had already been determined by a court of competent jurisdiction in order to justify or support the application for an order that this action be dismissed on the ground that there was an abuse of the process of the court. There was also no plea that the decision in the previous action had rendered the dispute *res judicata* or issue estoppel or cause of action estoppel, which is recognised in law to operate as a bar to the second action (this action). If the plea of *res judicata* or issues estoppel or cause of action estoppel had been raised, then the court still have to identify with precision the issue that was decided in the earlier proceedings. In other words, the court is entitled to look at the history of the case (usually where there is a likelihood of the

action being *res judicata*) to determine if there is a cause of action *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773).

[9] Upon perusing the appeal records, the chronology of events may be set out as follows:

1. On 30 July 2001, the respondent/plaintiff instituted a legal action against the appellant/defendant in the Sessions Court at Kuching under Summons No. 52-367-2001-II for the debt of RM104,344.89 together with interest thereon at 1.5% per month from 4 November 2000 till the date of full and final payment, solicitor and client's costs of RM8,347.59, cost (court fees) of RM200 and such other relief as the court deemed fit to make.

2. On 30 August 2001, the respondent/plaintiff obtained judgment in default against the appellant/defendant in Summons No. 52-367-2001-II for the above stated claims.

3. On 20 September 2001, the respondent/plaintiff enforced the said default judgment and in the enforcement proceedings the respondent/plaintiff obtained a Garnishee Order in Summons No. 52-367-2001-II against A & H Project Services Sdn. Bhd., a debtor of the appellant/defendant, to recover the judgment debts due from the appellant/defendant under the said default judgment and costs of garnishee proceedings.

4. On 29 September 2001, A & H Project Services Sdn. Bhd., had pursuant to the said Garnishee Order paid the said judgment debts and costs to the solicitors (previous solicitor) for the respondent/plaintiff in Summons No. 52-367-2001-II.

5. On 13 July 2002, the appellant/defendant obtained a court's order to set aside the said default judgment and 'all proceedings by way of execution subsequent to the said default judgment' with leave to enter conditional appearance and costs in the cause under Summons No. 52-367-2001-II.

6. On 18 October 2002, the appellant/defendant had also obtained an order to set aside the summons and statement of claim with costs, which was instituted by the respondent/plaintiff for the said debts and costs and to which the said default judgment and Garnishee Order were based under Summons No. 52-367-2001-II.

7. On 30 October 2002, the respondent/plaintiff appealed to the High Court at Kuching against the appellant/defendant's application for setting side of the summons.

8. On 23 April 2003 the High Court at Kuching dismissed the respondent/plaintiff's appeal with costs to the appellant/defendant.

9. On 20 October 2003 the respondent/plaintiff filed a fresh action against the appellant/defendant in the Sessions Court at Bintulu under Summons No. 52-153-2003 (BTU) over the debts together with interest and costs. This fresh action is on the same subject matter as in the early action in Summons No. 52-367-2001-II.

10. On 3 March 2004, the appellant/defendant entered the defence to the respondent/plaintiff's fresh action under Summons No. 52-153-2003 (BTU).

11. On 10 March 2004, the appellant/defendant filed an action against A & H Project Services Sdn. Bhd., a debtor of the appellant/defendant and the respondent/plaintiff and another party in a Suit No. 22-24-2004-III(II) in the High Court at Kuching to recover all the payments made under the Garnishee Order which were paid by A & H Project Services Sdn. Bhd. to two creditors of the appellant/defendant. One of the creditors was respondent/plaintiff. The writ of summons and statement of claim on the defendants named was served on or about 6 April 2004.

12. As for the instant action (Summons No. 52-153-2003 (BTU)], the appellant/defendant filed an application in the Sessions Court at Bintulu on 2 April 2004 for striking out on the ground that there was an abuse of the process of the court.

13. On 26 April 2004, the respondent/plaintiff by an affidavit in opposition opposed to the appellant/defendant's application for striking out of the instant action.

14. On 23 September 2004, the learned Sessions Court Judge dismissed the appellant/defendant's said application for striking out the instant action and hence the instant appeal (as I have discussed earlier).

[10] Before me the learned counsel for the appellant/defendant had agreed that there are triable issues but contend that no relief could be made if the instant action is proceeded on since the debts claimed had been paid in another action. In other words this case had been decided. I disagree with this contention.

[11] The affidavit evidence is clear that this case had not been decided. There is no dispute from the appellant/defendant that the case has not been decided or the issues in the early action had not been adjudicated upon. The appellant/defendant had not entered into defence to the early action under Summons No. 52-367-2001-II. The pleading in the early action is different from the present action. In the present action the appellant/defendant did not plead or adduce any evidence that the early action had been decided on the merits. All these goes to show that the early action had not been determined yet. In other words, in the early action there was no decision on the appellant/defendant's liability as the appellant/defendant had successfully set aside the foundation of the action itself which would otherwise be relied upon as an estoppel. As the result, there is no decision in the early action capable of determining the liability of the appellant/defendant or the amount recoverable or render the default judgment effective or capable of judicial recognitions or execution. The appellant/defendant had obtained court orders not just to set aside the default judgment but also the Garnishee Order and the whole action in which the appellant/defendant cannot approbate and reprobate and turn around to argue that the original debts had been settled or there was an abuse of the process of the court when the fresh action was instituted. To my mind, if not because of the setting aside orders, there is no necessity for the respondent/plaintiff to file this fresh action under Summons No. 52-153-2003 (BTU). There is no justification for the appellant/defendant to argue that the original debts in the early action had been executed when the appellant/defendant had at the same time also obtained the court orders to demolish the very foundation of the earlier proceedings. In the eye of the law, the liability in the early action between the appellant/defendant and respondent/plaintiff had not been determined. Therefore it follows that the respondent/plaintiff is legally entitled to commence the fresh action and to prove the cause at the trial. It is erroneous to say that the respondent/plaintiff by instituting this fresh action would get the payment of the same debts twice or

subsequent judgment tantamount to double recoveries of the same debts. Therefore the learned counsel for the appellant/defendant contend that due to this no relief could be made in this fresh action which I doubt its correctness.

[12] In order to determine whether the instant action under Summons No. 52-153-2003 (BTU) is an abuse of the process of the court it is also important to look at the respondent/plaintiff's summons and statement of claim at p. 1 to p. 7 to see whether the pleadings or the summons may be struck out as sought by the appellant/defendant of which to that summons the appellant/defendant had entered into defence and filed five pages of triable issues as their defence. To say that the instant action is an abuse of the process of the court, the appellant/defendant should have produced concrete evidence to show that the instant action is wholly and plainly 'pretenceless' or 'absolutely groundless' as described by *Sir Jack Jacob and Iain S Goldrein (supra)*. However the appellant/defendant did not or could not adduce any evidence to such conclusion. A mere assertion is insufficient to deprive the respondent/plaintiff from the judgment seat. It would be very unjust and prejudicial for the appellant/defendant to obtain the court orders for setting aside all the proceedings in the early action and now in the instant application to contend that the respondent/plaintiff had successfully executed a judgment that had been later set aside in order to get another court order for the striking out of the instant action against the respondent/plaintiff. But the appellant/defendant could not show any evidence that the instant action is an abuse of the process in the sense that it was frivolous, vexatious or manifestly groundless or in which there was no cause of action in law.

[13] As a conclusion I made myself constantly reminded that:

> ... pleadings will only be struck out in plain and obvious cases. So long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC.

and the instant case is not a fit and proper case to be struck out and I agree with the decision of the learned Sessions Judge.

[14] Since the instant action Summons No. 52-153-2003 (BTU) is before the Sessions Court and fixed for trial sometime this year (as informed by both counsel), I only made an order in respect of this appeal (for striking out) and that is I dismiss this appeal with costs and costs to be taxed unless agreed.

Order accordingly.